No. 78-779

In the Supreme Court of the United States

OCTOBER TERM, 1978

MITCHELL EDELSON, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALLAN A. ACKERMAN, ESQ.
100 North LaSalle Street
Suite 611
Chicago, Illinois 60602
(312) 332-2863
Attorney for Petitioner,
MITCHELL EDELSON, JR.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

CITATIONS

CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER AUTHORITIES

In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO.

MITCHELL EDELSON, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MITCHELL EDELSON, JR., petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Opinion of the Court of Appeals (App. A, *infra*, pp. App. 1-7) is reported, 581 F.2d 1290 (7th Cir., 1978). There is no opinion from the District Court.

JURISDICTION

The Judgment of the Court of Appeals (App. A, *infra*, p. App. 7) was entered on August 30, 1978. A timely Petition for Rehearing with Suggestions for an *En Banc* Hearing was filed; same was denied by the Court of Appeals for the Seventh Circuit on October 13, 1978 (App. B, *infra*, p. App. 8). The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) In view of the conflicts among the federal circuits, should this Court decide the question of whether a perjury indictment must disclose in what respect defendant's testimony was material to the Grand Jury's inquiry??[1]

(2) Is the "realistic-target" defendant entitled to a copy of his grand jury testimony, prior to indictment??? (Compare *Clavey* v. *U.S.*, this Court's docket 78-120, 23 Cr.L. 4167 (1978).

(3) Whether a perjury indictment and conviction under 18 U.S.C. §1623 can survive judicial scrutiny where the sole testifying witness on the subject of "materiality of the grand jury inquiry" was the Assistant U.S. Attorney who was responsible for presenting evidence to the grand jury??

(a) Whether the petitioner at bar was denied his Fifth Amendment right not to suffer a federal criminal conviction "without due process of law" and his Sixth Amendment right to have "compulsory process for obtaining witnesses in his favor" where the trial court totally refused the petitioner at bar any access whatsoever to the grand jury transcripts??

(b) Whether the government may have the benefit of a federal criminal conviction where the charge is perjury under 18 U.S.C. §1623 . . . where absolutely no court has ever seen any of the grand jury testimony (other than the petitioner's)??

(c) Whether a perjury indictment under 18 U.S.C. §1623 can survive the review of this Court where the sole alleged perjury, before a federal grand jury, is the difference between a series of undisclosed tape recordings as between the petitioner and his former client . . . and the petitioner's grand jury testimony??[2]

(4) Whether petitioner demonstrated a sufficient "particularized need" under this Court's decisions in *Pittsburgh Plate Glass* v. *U.S.*, 360 U.S. 395 (1959) and *Dennis* v. *U.S.*, 384 U.S. 855 (1966) so as to compel disclosure of the grand jury transcripts . . . if not to the petitioner then, at least to the trial court, in camera??

(a) Can a decision affirming a conviction stand where the Court of Appeals found no request for in camera in-

[1] In *U.S.* v. *Slawik*, 548 F.2d 75 (3rd Cir., 1975) that Court answered YES. Both this case and the Fifth Circuit decision in *Crippen* v. *U.S.*, this Court's docket 78-538 (1978) say NO.

[2] Compare *U.S.* v. *Slawik*, 548 F.2d 75 (3rd Cir., 1977) where that Court answered the same question No. In the petitioner's case it was clearly conceded that the only *alleged* perjury was the difference between the petitioner's grand jury testimony and a series of tape recordings approximately eighteen (18) months earlier; same not being disclosed to the petitioner at any time prior to or during his grand jury testimony. Compare *U.S.* v. *Del Toro*, 513 F.2d 65[illegible] at 665 (2nd Cir., 1975); *U.S.* v. *Jacobs*, 531 F.2d 87 (2nd Cir., 1976) on remand, 547 F.2d 772 (2nd Cir., 1976), cert. denied as improvidently granted, *U.S.* v. *Jacobs*, ... U.S. ....., 98 S.Ct. 1873 (1978).

spection of the grand jury testimony but, the record clearly shows the contrary?? Are these questions (1 through 4) sufficient to invoke the supervisory powers of this Court under Supreme Court Rule 19(b)??

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . Nor be deprived of life, liberty, or property, without due process of law . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> ". . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . ."

The Statute involved is 18 U.S.C. §1623. This statute reads:

> § 1623. *False declarations before grand jury or court*
>
> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (b) This section is applicable whether the conduct occurred within or without the United States.

> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—
>
> (1) each declaration was material to the point in question, and
>
> (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.
>
> In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.
>
> (d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.
>
> (e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

STATEMENT OF THE CASE

(A)

The Background

The Petitioner, for approximately eighteen (18) years prior to 1974 was a practicing lawyer in Chicago, Illinois. In approximately January, 1974 a man named Roger Camp sought the petitioner's help. Camp had been indicted in Chicago for a series of mail fraud transactions under Indictment 73 CR 881. Petitioner agreed to represent Camp in his up-coming federal criminal trial in Chicago, Illinois. Unbeknown to petitioner Camp was a government informer and, while under indictment in Chicago, Camp surreptitiously recorded a series of telephone conversations as between himself and petitioner during approximately March and April, 1974. Camp and his accomplices forwarded these tape recordings to the Secret Service and the Strike Force Division of the U.S. Attorney in Chicago in April, 1974.[3] Camp stood trial (with petitioner as his counsel) in June, 1974. Camp was convicted and received a three (3) year sentence. Camp eschewed any opportunity to appeal. Rather, Camp went directly "back into the enemy-camp". Camp's sentence was later reduced to one (1) year. Disston was sentenced to two (2) years in custody and while serving his sentence sought post-conviction relief. The trial court denied any post-conviction relief. The Court of Appeals reversed.[4]

[3] These facts are without dispute. Camp had a co-defendant, *G. Disston*. Disston had sought a severance from Camp under 73 CR 881. *Disston* had also received an order from the trial court granting him the right to see and/or hear anything that Camp had given the government. The government told the trial court and Disston (and petitioner as Camp's attorney) that there were no statements and/or electronic eavesdropping. Of course, as later facts revealed, the government was less than candid. See *U.S.* v. *Disston*, ... F.2d ....., (#77-1353, Aug. 15, 1978, 7th Cir.). The *Disston* decision is reproduced as App. C, *infra*). Up until 1978 both the Strike Force and the U.S. Attorney's Offices were on the 15th Floor in the Federal Building in Chicago. Henderson, the Strike Force Attorney, got hold of the tapes in April, 1974. Henderson testified as a trial witness in petitioner's case that he was aware of Camp's up-coming trial (Tr. 403-409) although the U.S. Attorney

(footnote continued)

(B)

Petitioner's Grand Jury Appearance, Testimony, Indictment And Trial

The tape recordings as between Camp (the government informer and petitioner's then client) and petitioner were taken sometime in late March and early April, 1974. Notwithstanding seasonable trial requests (as the record under 73 CR 881 demonstrates) Camp's tape recordings were not turned over either to the co-defendant, Disston, or to Camp's attorney (who made specific request for same both

(footnote continued)

and not the Strike Force was prosecuting Camp in Indictment 73 CR 881. Henderson (the Strike Force Attorney in petitioner's case) knew the Assistant U.S. Attorney who was trial counsel for the government in 73 CR 881 (Tr. 490-493). The *background* as between petitioner and government trial counsel in 73 CR 881 is set forth at pg. 10, n. 11 of this petition.

In any event, we find it impossible to believe that the Strike Force Attorney, armed with the tapes involving Camp and the petitioner in April, 1974 did not tell government trial counsel of this revelation in that they were both on the same floor, in the same building, and in the same office. It strains imagination to believe that both government attorneys did not share in the "tapes".

[4] *U.S.* v. *Disston*, ... F.2d ..... (7th Cir., 1978) . . reproduced as App. C, *infra*, pp. 9-16. The decision in *Disston* reviews at least *some of the facts* as set forth above.

before and after the trial under indictment 73 CR 881). In approximately May, 1975 petitioner was called before a federal grand jury sitting in Chicago, Illinois. When the questioning commenced the following grand jury testimony appears:

> "... *A. I understand that. Am I also entitled to a copy of this proceeding?*
>
> *Q. You are not entitled to a copy of the proceedings at this time ...*"[5]

In any event, petitioner testifies and answers some seventy-five (75) questions. Government counsel, in charge of the grand jury investigation later related that most of his questions came from reviewing the tapes and transcripts of the "Camp tape recordings"; same being undisclosed to the petitioner until post-indictment.[6] It is worthy of note that apparently NO OTHER WITNESS ACTUALLY TESTIFIED BEFORE THE GRAND JURY IN CONNECTION WITH THE INSTANT INDICTMENT.[7]

In October, 1975 petitioner was charged in a four (4) count indictment with violating 18 U.S.C. §1623. The indictment is reproduced as App. D, *infra*, pp. 17-19.

Prior to trial, *inter alia*, the petitioner sought access to the grand jury materials.[8] Alternatively, the petitioner

[5] R. 17, Exh. B, Tr. 3. In *Clavey* v. *U.S.*, Sup.Ct. Dkt. #78-120 a question presented relates to whether a grand jury witness is entitled to see a transcript of their own testimony. Cf., *Bast* v. *U.S.*, 542 F.2d 893 (4th Cir., 1976) Wyzanski, dissenting ... urging that the witness ought have access to their own testimony, 542 F.2d 897-899.

[6] Tr. 468.

[7] Tr. 449-452. V. Nicasio was called, but took the Fifth.

[8] R. 21; 1/23/75, p. 2, ¶2.

asked that the trial court review the materials, in camera. Again, prior to trial the petitioner sought leave of court to interview either the grand jurors and/or the official court reporters to ascertain how, if at all, the petitioner's testimony before the grand jury was "material" (R. 57-62). These motions (for grand jury interviews) were presented to the chief judge in the district on March 17, 1977. The chief judge deferred ruling on the motions and sent the requests and motions to the trial judge. The trial judge declined to grant any relief whatsoever (R. 62). At all times herein pertinent the government opposed production of the grand jury materials AND UP UNTIL TODAY NO COURT (TO OUR KNOWLEDGE) HAS EVER REVIEWED ANY GRAND JURY MATERIALS IN THIS CASE.

Prior to trial the petitioner sought to suppress both his grand jury testimony and the tapes. The trial court declined to suppress (R. 69-70).[9] A bench trial commenced

[9] *Inter alia*, the tapes were alleged to have been recorded in violation of 18 U.S.C. §2511(2)(d). In pertinent part, §2511 states:

> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

During the suppression hearing the government alternated their positions. The government claimed they knew nothing about Camp's taping activities and that he did them on his own (Tr. 26, 29-30, 62-63). Thus he was *not* really doing it for the government even though he was an informer (if he was an informer, how could he be doing it on his own)??

in March, 1977 and eventually petitioner was convicted on two (2) of the four (4) counts in the indictment.[10] On May 25, 1977 the petitioner filed his post-trial motions (R. 83). On June 2, 1977 all post-trial motions were denied and petitioner was sentenced to a year in custody.[11]

---

[10] The trial court acquitted petitioner of perjury as regarding ¶'s 4 and 7 of the indictment and entered a judgment of guilty as to ¶'s 5 and 6 of the indictment (Tr. 1358-1361; 4/4/77). The indictment is reproduced as Appendix D, pp. 17-19, *infra*.

[11] On May 26, 1977 at R. 89 the petitioner filed what is the equivalent of a pre-sentence investigation (Fed.R.Crim.Proc., R. 32(c). Within that statement petitioner calls the court's attention to the *fact* that in the early 1970's petitioner was a member of the Criminal Law Section of the Chicago Bar Association and that Committee investigated eavesdropping. One of the eavesdropping targets was a then local prosecutor, *Friedman*. The Illinois Bar Association filed charges against Friedman relating to "eavesdropping". Friedman was GOVERNMENT COUNSEL IN *U.S. V. CAMP AND DISSTON*, 73 CR 881. To put it mildly there was "bad blood" as between petitioner (Camp's trial counsel) and *Friedman*. In the Camp-Disston record there is at least one docket entry relating to non-eavesdropping which was signed by Friedman. Thus, in the early 1970's, Friedman transferred his prosecutorial duties from the local District Attorney's Office to the United States Attorney's Office . . . *Lupus pilum mutat, non mentem*. Friedman was still a member of the U.S. Attorney's Office when petitioner was indicted. Could this prosecution be *mala fide*?

REASONS FOR GRANTING THE WRIT

---

(1) In view of the conflicts among the federal circuits, should this Court decide the question of whether a perjury indictment must disclose in what respect defendant's testimony was material to the Grand Jury's inquiry?

Petitioner at bar respectfully states that the conflict within the Circuits merits this petition being granted. In *U.S.* v. *Slawik*, 548 F.2d 75 (3rd Cir., 1977) that Court reversed a series of grand jury perjury convictions. The *sine qua non* of the indictments seemingly rested on the difference between certain tape recordings and *Slawik's* grand jury testimony (548 F.2d 78-83). In *Slawik* the Court reversed stating:

> *But a tape recording of extra-judicial conversations does not serve the same purpose. In cases where the government is relying upon extra-judicial prior inconsistent statements to establish falsity, proof of mere inconsistency is not enough. The grand jury must charge specifically what it believes are the true facts.* Moreover if the courts are to discharge their obligation of determining materiality they should be informed in the indictment in what manner the falsity alleged affected the grand jury's deliberations. Finally, without attempting to lay down any standard of prosecutorial conduct before the grand jury for all cases, we think it fair to say that if transcriptions of electronic interceptions are to be the basis for false swearing prosecutions we will insist that the government's interrogation be far more precise than in this case. (548 F.2d at 87; emphasis ours).

In the present case the perjury allegation(s) against this petitioner are clarified by the trial court as follows:

> " . . . *The Court: And he was indicted only in those areas where his testimony could be contrasted with the tapes.*
>
> Mr. Gerber: That is right.
>
> *The Court: I recognize that, I accept that as a fact."* (Tr. 469).[12]

The indictment absolutely fails to reflect what the grand jury believed to be the true facts. Further, the indictment does not set forth in any manner, how the alleged falsity affected the grand jury's deliberations (Cf., App. D, infra, and *Slawik, ante,* at 87). The decision in *Slawik* was urged on the Fifth Circuit in *U.S.* v. *Crippen,* 570 F.2d 535 (5th Cir., 1978) (on rehearing, 579 F.2d 340, 5th Cir., 1978), cert. pending, ... U.S. ....., #78-538 (1978). The *Crippen* Court declined to follow *Slawik* as follows:

> To adopt the rule in false swearing cases that the full predicate for the charge be set forth in the indictment, in addition to the allegations of the essential elements of the offense, would be tantamount to requiring that such supporting evidence be alleged in indictments charging all other federal offenses. This requirement is not warranted by general principles of criminal law, *Estes* v. *United States,* 5 Cir. 1964, 335 F.2d 609, 619, *cert. denied,* 1965, 379 U.S. 964, 85 S.Ct. 656, 13 L.Ed.2d 559, nor is it needed to enable the defendant adequately to prepare his defense, nor, finally, does its absence create a danger of double jeopardy. To the extent that *Slawik* requires the indictment to recite facts showing materiality in indictments for false swearing, we decline to adopt it as the law of this circuit. (579 F.2d at 342) [13]

[12] Mr. Gerber was trial counsel for petitioner in the court below. The trial court clarified, for all times, the perjury allegation against petitioner. The entire "perjury" (???) was the difference between his grand jury testimony and the undisclosed tapes and/or transcripts. We further note that the trial transcripts fail to reflect just what the grand jury heard or saw (*viz-a-viz* tapes and/or transcripts, Tr. 452-455).

In the case at bar petitioner respectfully points out that *Slawik* although raised in the petitioner's original brief in the Court of Appeals for the Seventh Circuit (Edelson's Brief, pp. 26, 43, 49, 77, 79, 80, and 86) and in his petition for rehearing (pp. 14, 15) the Court while affirming petitioner's perjury conviction does not so much as mention the *Slawik* decision.

Petitioner has presented a clear and unmistakable conflict within the Third vs. the Fifth and Seventh Circuits. We respectfully urge that this Court grant the instant petition so as to resolve not only the conflict as between the Circuits but to clarify a substantial question which will again arise (undoubtedly) within the prosecution of cases under 18 U.S.C. §1623.

(2) Is the "realistic-target" defendant entitled to a copy of his grand jury testimony, prior to indictment??? (Compare Clavey v. U.S., this Court's docket 78-120, 23 Cr.L. 4167 (1978).

On May 6, 1975 petitioner, pursuant to subpoena, appeared before the Special November 1974 Grand Jury in

[13] Unlike either Slawik or the case at bar *Crippen* did not involve tape recording conversations played to the grand jury in order to establish "perjury" under 18 U.S.C. §1623.

Chicago, Illinois. After government counsel[14] advised petitioner of certain of his rights before the grand jury the petitioner asked whether he was entitled to a copy of "this proceeding". The U.S. Attorney answered that "You are not entitled to a copy of the proceeding at this time" (R. 19, Exh. B, pg. 3). This Court has before it a similar case, *Clavey* v. *U.S.*, cert. pending, Docket #78-120 (1978). In *Clavey* the record demonstrates that following *Clavey's* grand jury appearance he requested from the Chief Judge that he be given a copy of his grand jury testimony (*Clavey*, 565 F.2d 111 at 113-115, 7th Cir., 1977). In *Clavey* the majority opinion declined to find that *Clavey* was entitled to release of his grand jury transcript prior to indictment (id. at 114-115). The Court of Appeals heard the *Clavey* case *in banc*, 578 F.2d 1219 (7th Cir., 1978). The *in banc* court being equally divided, affirmed the original decision (578 F.2d 1219).[15] We frankly suggest, that it borders on the incredible to assume that the grand jury witness is not entitled PRIOR TO INDICTMENT to his own grand jury testimony. The government urged to the trial court that this petitioner was not a "target" of the

[14] James D. Henderson, Esq. was a U.S. Attorney with the Strike Force in Chicago in May, 1975. Henderson was the only trial witness to testify as to the "materiality" of the grand jury inquiry. Henderson's trial testimony regarding materiality is, in part, reproduced from Tr. 458-469. Henderson, post-conviction, appeared on the government's brief as appellate counsel in the Seventh Circuit brief filed in this case. Thus, Henderson was alternatively an advocate, the sole government witness on the question of materiality and later, again, an advocate. This Court might well wonder as to the propriety of this.

[15] Four (4) of the eight (8) Circuit Judges dissented and voted to reverse (578 F.2d 1219-23). The thrust of the dissenting judges seem to indicate that the witness was entitled to inspect his own grand jury testimony so as to allow recantation under 18 U.S.C. §1623(d) . . . 578 F.2d 1220-1223.

grand jury investigation. If he was not, and if the government did not intend to indict him, let the government advise this Court what government counsel meant when he told the petitioner that the petitioner could not get his own testimony "at this time" (Cf., *Clavey*, 565 F.2d at 120-124; *Clavey en banc*, 578 F.2d 1220-23 and *U.S.* v. *Crocker*, 568 F.2d 1049 (3rd Cir., 1977) . . . at 1053-1056).[16] Under this question the petitioner respectfully urges that this writ be granted and the question be considered along with the *Clavey* case, #78-120 (1978).

(3) Whether a perjury indictment and conviction under 18 U.S.C. §1623 can survive judicial scrutiny where the sole testifying witness on the subject of "materiality of the grand jury inquiry" was the Assistant U. S. Attorney who was responsible for presenting evidence to the grand jury?

(a) Whether the petitioner at bar was denied his Fifth Amendment right not to suffer a federal criminal conviction "without due process of law" and his Sixth Amendment right to have "compulsory process for obtaining witnesses in his favor" where the trial court totally refused the petitioner at bar any access whatsoever to the grand jury transcripts??

(b) Whether the government may have the benefit of a federal criminal conviction where the charge is perjury under 18 U.S.C. §1623 . . where absolutely no court has ever seen any of the grand jury testimony (other than the petitioner's)??

[16] In *Crocker* the Court seemingly decided that *Crocker* was a grand jury target and set forth certain "tests" as to target *vel non* (568 F.2d at 1054-55).

(c) Whether a perjury indictment under 18 U.S.C. §1623 can survive the review of this Court where the sole alleged perjury, before a federal grand jury, is the difference between a series of undisclosed tape recordings as between the petitioner and his former client . . . and the petitioner's grand jury testimony??

A smattering of factual background is realistically necessary to understand the thrust of the petitioner's position. The taped conversation as between Camp and the petitioner related, in part, to a series of conversations relating to what might be considered counterfeit money and/or fraudulent securities. In any event, either prior to or during the tapes the government called off the "deals" (the deals were to have been between Camp and Nicasio).[17]

The grand jury investigation did not commence until May, 1975, some fourteen (14) months after the taped telephone calls. As to the materiality of any of the Camp-petitioner taped conversations, only the U.S. Attorney, as a trial witness, testified as to materiality. Over objection, the U.S. Attorney (now a witness as opposed to an advocate) told the trial judge as follows:

By Mr. Ward:

Q. Now, Mr. Henderson, prior to Mr. Edelson appearing before the grand jury, what information had come to your attention as an attorney assisting the grand jury concerning any relationship of Mitchell Edelson concerning that investigation?

Mr. Gerber: Your Honor, I'm going to object to the form of that question. I think he ought to state

[17] Nicasio was not charged by the grand jury with any offense whatsoever. According to U.S. Attorney Henderson Nicasio was the "subject" of the investigation (Tr. 367-8). As to the government calling off any Camp-Nicasio "deals", compare Tr. 703-4, 724, 737, 739, 754.

the question and get an answer instead of asking for Mr. Henderson's conclusions, or versions of them.

The Court: What would be the purpose of the witness telling us what was in his mind at the time, counsel? I don't understand where you're going.

Mr. Ward: We go the question of the materiality of the questions that were asked of Mr. Edelson during his appearance in the grand jury.

Mr. Gerber: Isn't that a question of law?

Mr. Ward: It's necessary to have facts in order to—

The Court: We have to know what the questions were material to.

You can tell us generally. What were you investigating and what information did you have that you believed connected Mr. Edelson to it?

The Witness: The grand jury at that time was investigating violations of the law concerning stolen securities, such as interstate transportation of stolen securities, possession of stolen securities, aiding and abeting, conspiracy, and also investigating the statute dealing with possession and dealing with counterfeit currency, the printing of counterfeit currency, again, aiding and abeting and possible conspiracy charges. The information that was available at that time—

Mr. Edelson: I would object to the witness going on without a question.

The Court: It's overruled, he's answering the question I asked him. Go ahead.

The Witness: The information that was available at that time connected Mr. Edelson to possible involvement with those violations were the tape recordings, of which I was aware and which I testified about previously in the suppression hearing; the conversation that I had with Special Agent Cozza involving the meeting between Mr. Camp and Mr. Edelson in February of

1974; and also had discussed generally the involvement of Mr. Edelson with Mr. Camp himself prior to Mr. Edelson's appearance before the grand jury.

The Court: The subject of the grand jury investigation at that time was whom?

The Witness: The subject of the grand jury investigation, your Honor, was Vito Nicasio. (Tr. 366-368)

That, if it please this Court, was the sole testimony offered during this trial as to "materiality". Petitioner, was not afforded the opportunity to present *any evidence whatsoever* that either his testimony and/or the tape recordings were not "material" to the grand jury investigation. During the course of the trial it turned out that there were different sets of transcripts (from the tapes) and the defendant, at trial, urges the Court to ascertain which transcripts the grand jury had before it. At that point the trial court *REFUSES TO CONSIDER WHAT THE GRAND JURY HAD BEFORE IT* (Tr. 716).

In petitioner's question 1, *ante,* we reviewed the conflict as between the Third Circuit and the Fifth and Seventh Circuits (that is to say, the question of how a §1623 indictment must be framed, particularly where, as here, the grand jury had *only* petitioner's testimony vs. earlier taped conversations as between the government informer (*not testifying before the grand jury*) and the petitioner). Now, during trial, the court refuses to consider what the grand jury actually had before it and considers only the testimony of the U.S. Attorney as to how, if at all, the petitioner's testimony was material to the grand jury inquiry. Interwoven is the problem that the petitioner was at all times not only denied access to the grand jury materials (other than his own testimony, post-indictment) but, further, petitioner was denied the opportunity to either speak

to or subpoena any of the grand jurors or the official court reporter. We view the combination of these factors to be absolute denials of Fifth and Sixth Amendment protections. Under the Sixth Amendment the accused has the right to have compulsory process for obtaining witnesses in his favor. Clearly, petitioner was denied that precious right. The corollary proposition is simply that this Court will not sanction a conviction which violates the Fifth Amendment "without due process of law". The case at bar demonstrates glaring violations of both constitutional Amendments.

Materiality, under 18 U.S.C. §1623, must be alleged and proved, *U.S.* v. *Howard,* 560 F.2d 281 at 284-85 (7th Cir., 1977). The traditional "and honest" way of proving up the materiality of the grand jury inquiry is to call a member of the grand jury who would be in a position to testify as to what the grand jury was investigating and how, if at all, the testimony of the witness misled or otherwise impeded the progress of the grand jury inquiry (cf., *U.S.* v. *Parker,* 244 F.2d 943 at 951 (7th Cir., 1957).[18] To use an advocate as a witness (the A.U.S.A. later again became the advocate in that his name appears as one of the government attorneys writing the appellee's brief for the Court of Appeals for the Seventh Circuit in the instant case) on what is realistically the most crucial question (materiality) can hardly comport with due process especially where "other non-interested witnesses are readily available.[19] We can safely reflect that the U.S. Attorney testifying as to materiality was hardly a disinterested witness. In the recent decision, *In Re Grand Jury Subpoenas,* 573 F.2d

[18] See also, *U.S.* v. *Marchisio,* 344 F.2d 653 (2nd Cir., 1965).

[19] The government, while opposing the defense motions for interviewing grand jury witnesses laid no claim to the unavailability of any grand jurors (R. 59-62).

936 (6th Cir., 1978) the majority of the Court held that the appointment of an I.R.S. Attorney to conduct a grand jury investigation was improper and the I.R.S. attorney was disqualified from conducting the grand jury investigation (573 F.2d 941-945).[20] That Court put the various propositions as follows:

> "GM further complains about the presence of Piliaris in the secret hearings before the grand jury where it would be possible for him to have access to evidence which IRS could use in civil matters against GM, not only with respect to its tax return for 1972, but also with respect to its returns for subsequent years. Piliaris has been placed in a conflicting and intolerable position.
>
> It should also be remembered that the function of the prosecutor, as was held in *United States* v. *Calandra, supra,* in addition to obtaining an indictment where probable cause has been shown that a crime has been committed, is also to protect citizens against unfounded criminal prosecution.
>
> In *Wood* v. *Georgia,* 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962), Mr. Chief Justice Warren, writing the opinion for the Court, described the function of a grand jury with respect to its protection of the rights of citizens, in stronger terms, stating:
>
> > 'Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.'
>
> In the present case the worry of GM is that Piliaris has an axe to grind and is more interested in justifying his previous investigations, his recommendations, and

[20] Dissenting opinion noted.

the conduct of IRS agents than in protecting GM against unfounded criminal prosecution. It is our duty to determine these important questions now, and not to await review of a possible protracted criminal trial, and not to permit the conduct of grand jury procedures for civil purposes.

In a hearing in the District Court the following exchange took place between the Court and the Government attorney:

> 'The Court: Why can't you take any Internal Revenue Service lawyer and make him a special attorney by appointment and turn the grand jury investigation over to him, let him run the whole show?
>
> Mr. McBride: Conceivably that could be done.
>
> The Court: You are saying that would be appropriate?
>
> Mr. McBride: Yes, your Honor, for this reason—
>
> The Court: I ought not be concerned with it?
>
> Mr. McBride: Again for this reason that the law, Section 515 and 543 of Title 28, does not put any limits on the authority of the attorney general. It puts him in control and GM, nor the Court, if I may be forgiven to say so, are not, I think, in a position, and GM should not be able to dictate who it will have conducting this grand jury or to assist in the conduct of this grand jury as it has also been trying to dictate who would be persons to assist the government attorneys and suggesting that we have other people.[21]' " (573 F.2d at 942-943)

[21] "It does seem to be anomalous that the attorney for the person being investigated is not permitted to appear before the grand jury and represent his client but is excluded, while here the attorney on the payroll of the Agency instigating the investigation was authorized not only to appear but also to conduct the grand jury proceeding. We do not believe it to be appropriate for either of these attorneys to appear and represent their respective clients before the grand jury." (573 F.2d at 943)

In reviewing our Sixth Amendment claim we borrow a quotation from this Court. In *Davis* v. *Alaska,* 415 U.S. 308 (1974) a majority of this Court held that the Sixth Amendment was violated where the defendant did not have an opportunity to cross-examine a key prosecution witness regarding the prosecution witness' juvenile record. In pertinent part, this Court viewed the Sixth Amendment as follows:

> The *Sixth Amendment* to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings under *Pointer* v. *Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Confrontation means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." *Douglas* v. *Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Professor Wigmore stated:
>
> > "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." (Emphasis in original.) (415 U.S. at 315-16)

Of course, petitioner was denied the opportunity to examine any of the grand jurors (on the question of materiality). Even more damning is (was) the trial court's position during the cross-examination of the U.S. Attorney who testified as to the materiality of the grand jury inquiry. The Court *DISALLOWED* petitioner's trial counsel the opportunity, by way of cross-examining the U.S. Attorney, to at all explore the materiality question. In fact, the trial court sustained all objections to "that line of questioning".[22]

On the issue as to whether the petitioner at bar was denied the Sixth Amendment right to compel the attendance of witnesses and offer their testimony, we urge this Court's opinion in *Washington* v. *Texas,*[23] as dispositive authority for the petitioner at bar. This Court, while reversing a state murder conviction urged the "compulsory process" aspect of the Sixth Amendment as follows:

> *The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.* (388 U.S. at 18, 19)

Petitioner's attack on the proceedings below is just as simple as his citation to *Washington, ante.* He wanted witnesses and the Court denied him that precious right. The issue to be there resolved (at the trial court) was whether his statements to the grand jury (assuming, *arguendo,* their falsity) were material to the inquiry of that grand jury. We are hard-pressed to believe that the constitutional mandates were not violated when petitioner was utterly

---

[22] The trial court, from Tr. 458 to 469 allowed the proffered questions on materiality to stand as the defendant's "offer of proof" in that the objections were continuously proffered and sustained. There is realistically "no probing" of the materiality issue (Tr. 458-469; 482-485).

[23] 388 U.S. 14 (1967).

denied both his opportunity to cross-examine the sole government witness on the issue, and, further, was prohibited from presenting witnesses on his own behalf to counter that testimony (on materiality) as proffered by the U.S. Attorney (as the trial witness on materiality). We respectfully conclude this issue by urging that the petition be granted and the conviction be set aside.

(4) Whether petitioner demonstrated a sufficient "particularized need" under this Court's decisions in Pittsburgh Plate Glass v. U.S., 360 U.S. 395 (1959) and Dennis v. U.S., 384 U.S. 855 (1966) so as to compel disclosure of the grand jury transcript . . . if not to the petitioner then, at least to the trial court, in camera??

(a) Can a decision affirming a conviction stand where the Court of Appeals found no request for in camera inspection of the grand jury testimony but, the record clearly shows the contrary?? Are these questions (1 through 4) sufficient to invoke the supervisory powers of this Court under Supreme Court Rule 19(b)??

In *Pittsburgh Plate Glass* v. *U.S.*,[24] this Court affirmed a federal conviction relating to conspiring to violate the Sherman Act. As relating to grand jury testimony and particularized need this Court found that the record did not bear out the allegation that the trial judge failed to examine grand jury transcripts. In pertinent part, a then-majority of this Court put the issue as follows:

> It does not follow, however, that grand jury minutes should never be made available to the defense. This Court has long held that there are occasions, see *United States* v. *Procter & Gamble, supra,* 356 U.S. at 683, 78 S.Ct. at page 987, when the trial judge may in the exercise of his discretion order the minutes of a grand jury witness produced for use on his cross-examination at trial. Certainly "disclosure is wholly proper where the ends of justice require it." *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at page 234, 60 S.Ct. at page 849.
>
> The burden, however, is on the defense to show that "a particularized need" exists for the minutes which outweighs the policy of secrecy. We have no such showing here. As we read the record the petitioners failed to show any need whatever for the testimony of the witness Jonas. They contended only that they had a "right" to the transcript because it dealt with subject matter generally covered at the trial. Petitioners indicate that the trial judge required a showing of contradiction between Jonas' trial and grand jury testimony. Such a preliminary showing would not, of course, be necessary. While in a colloquy with counsel the judge did refer to such a requirement, we read his denial as being based on the breadth of petitioners' claim. *Petitioners also claim error because the trial judge failed to examine the transcript himself for any inconsistencies. But we need not consider that problem because petitioners made no such request of the trial judge.* The Court of Appeals apparently was of the view that even if the trial judge had been requested to examine the transcript he would not have been absolutely required to do so. It is contended here that the Court of Appeals for the Second Circuit has reached a contrary conclusion. *United States* v. *Spangelet,* 258 F.2d 338. *Be that as it may, resolution of that question must await a case where the issue is presented by the record.* (360 U.S. 400-401)[25]

[24] 360 U.S. 395 (1959).

[25] Four (4) members of this Court, in a strongly worded dissent urged that the failure to compel production of the grand jury testimony compelled a new trial (360 U.S. 402-410). In the case at bar THERE CAN BE ABSOLUTELY NO QUESTION THAT THE PETITIONER SOUGHT *IN CAMERA* INSPECTION OF THE GRAND JURY MINUTES PRIOR TO TRIAL (R. 21, Discovery Motion, pg. 2, ¶2; R. 42, R. 83, pg. 8, ¶14. To the extent that the Court of Appeals found no such request in the trial record, the opinion is clearly erroneous, 581 F.2d at 1291-92.

In *Dennis* v. *U.S.*,[26] this Court reversed a series of conspiracy, *et seq.* convictions and discussed the production of grand jury testimony *vel non* and "particularized need". While reversing, this Court variously observed as follows:

> Certainly in the context of the present case, where the Government concedes that the importance of preserving the secrecy of the grand jury minutes is minimal and also admits the persuasiveness of the arguments advanced in favor of disclosure, it cannot fairly be said that the defense has failed to make out a "particularized need." (384 U.S. at 871-2)
>
> • • •
>
> In any event, "it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness." *Pittsburgh Plate Glass,* 360 U.S., at 410, 79 S.Ct., at 1246 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. (384 U.S. at 874-875)
>
> • • •
>
> Because petitioners were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination, we reverse the judgment below and remand for a new trial. It is so ordered. (384 U.S. at 875)

The question of "particularized need" has oft been reviewed. In *United States* v. *Duffy,* 54 F.R.D. 549 (N.D., Ill., 1972):

[26] 384 U.S. 855 (1966).

> "Because of the nature of the charge in the case at bar, perjury before the grand jury, there is a particularized need for the production of the grand jury testimony of those witnesses whom the government will present at trial. Whether the defendant has perjured himself will depend on a comparison of his testimony with the testimony of other witnesses which will presumably be the same at the trial as it was before the grand jury. Nuances in the testimony of those witnesses may be important. The government has access in advance of trial to both the testimony of defendant and the testimony of the other witnesses and fairness requires that the defendant have like access to the same testimony." (54 F.R.D. at 550-551).

Lest there be no mistake, the grand jury returning the instant indictment had been disbanded long prior to the trial. In *State of Wis.* v. *Schaffer,* 565 F.2d 961 (7th, 1977), the Court ordered the production of grand jury testimony *albeit* the particular grand jury materials apparently did not include the testimony of the State trial witnesses (Id. at 967). While compelling disclosure, in part, the Court stated:

> ". . . We are aware that demonstrating a particularized need is often a difficult task and applying this standard to a given set of facts is an inexact process. Courts have found that a *particular need* has been shown when disclosure is requested to impeach a witness. *United States* v. *Procter & Gamble,* supra, 356 U.S. at 683, 78 S.Ct. 983, to attack deposition testimony, *Atlantic City Electric Co.* v. *A.B. Chance Co.,* 313 F.2d 431 (2d Cir. 1963), or to refresh a witness' recollection about matters he previously testified to before a grand jury, *Baker* v. *United States Steel Corp.,* 492 F.2d 1074, 1079 (2d Cir. 1974)." (565 F.2d 966-967).
>
> • • •

> *"Once a grand jury has completed its work, indictments having been brought, the reasons for secrecy become less compelling. State of Illinois* v. *Sarbaugh,* 552 F.2d 768, 775 (7th Cir., 1977). The grand jury in question sat between June and November of 1974, and even though the government asserts that some of the matters relating to that grand jury investigation have not been concluded, it has undoubtedly completed its primary task. '*[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.*" *Socony-Vacuum Oil Co., supra,* 310 U.S. at 234, 60 S.Ct. at 849." (565 F.2d at 967) [27]

It is respectfully submitted, that the petitioner at bar demonstrated the requisite "particularized need" and therefore both the trial court and the Court of Appeals erred while concluding to the contrary. What greater particularized need could there be? In the instant case the trial transcripts reflect that Edelson only actually gave testimony before the grand jury that returned the instant indictment (the never-indicted alleged subject, Nicasio asserted a testimonial privilege and the only other witness apparently appearing was a Secret Service Agent, Juris, Tr. 447-452). Whatever "particularized need" may or may not mean it is respectfully urged that the petitioner at bar made a threshold showing and to deny ANY COURT OR THE PETITIONER ACCESS TO THE GRAND JURY MATERIALS ABSOLUTELY CONTRAVENES THE CONSTITUTIONAL PROTECTIONS GUARANTEED TO ANY DEFENDANT IN A FEDERAL CRIMINAL

[27] In *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 234, 60 S.Ct. 811, 849, 84 L.Ed. 1129 (1940), the Court said that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." While this statement may appear to have been limited by *Procter & Gamble* and *Pittsburgh Plate Glass,* it was quoted with approval in *Dennis,* 384 U.S. at 870, 86 S.Ct. 1840.

TRIAL. In *Illinois* v. *Sarbaugh,* 552 F.2d 768 (7th Cir., 1977) the Court reviewed, while granting limited grand jury disclosure, the various justifications supporting the policy of grand jury secrecy (id. at 774-778). The reasons are set forth as follows:

> "Courts have asserted five justifications in support of the policy of grand jury secrecy: (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment or their friends from importuning the grand jury; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosure by persons who have information with request to the commission of crimes; and (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and free from the expense of standing trial where there was no probability of guilt. The dual purpose of these justifications is to protect the integrity of ongoing grand jury proceedings and to assure the effective functioning of future grand juries." [28]

Not a single justification at all appears for denying the petitioner at bar the grand jury minutes or testimony. We respectfully urge that under this issue (more properly, question) that the petition be granted and the conviction vacated with directions that petitioner be tried anew.

[28] Loyola University of Chicago, L. J., Vol. #9, Summer, 1978, pp. 984-1014, gives an in-depth review of the diminishing approach to grand jury secrecy. The above "five (5) justifications" in support of grand jury secrecy are reproduced directly from the L.J. article at pp. 987.

We have alluded to the supervisory powers of this Court. We respectfully urge that they be invoked in favor of the petitioner in this case. Putting the pieces of this fragmented puzzle together is no easy task. The government informer, Camp (petitioner's erstwhile client) did not testify before the grand jury returning the instant perjury indictment. The government witness (the U.S. Attorney) was unclear as to which tape recordings were played to the grand jury and which transcripts they may have seen (Tr. 451-455). The trial court refused to consider what the grand jury returning the instant indictment had before it (Tr. 716). Only the U.S. Attorney testified as to what the grand jury had before it and the defense was at all times herein pertinent absolutely denied any and all access to the grand jury record. The Court of Appeals, while affirming the instant conviction, erroneously found that no request for the grand jury testimony was made (581 F.2d 1291-1292). Even further, the Court of Appeals, while affirming the instant conviction, found that the U.S. Attorney was under no duty to alert the petitioner to the fact that he had been eavesdropped and that the actual questions being proffered to him by the U.S. Attorney were gleaned from the tapes and transcripts which the U.S. Attorney reviewed before questioning petitioner at the grand jury (Tr. 468). Even further, there was approximately fourteen (14) odd months as between petitioner's grand jury appearance and the surreptitiously taped telephone conversations (March and April, 1974 were the pertinent "taping dates") and petitioner appeared before the grand jury in May, 1975. Of course, the Court of Appeals for the Second Circuit disapproved conduct of this kind, *U.S.* v. *Jacobs*, 531 F.2d 87 at 89 (2nd Cir., 1976); on remand, 547 F.2d 772 (2nd Cir., 1976) . . . cert. dismissed, as improvidently granted, *U.S.* v. *Jacobs*, ... U.S. ....., 98 S.Ct. 1873 (1978). However, the Court of Appeals in the instant case found that the prosecutor had no duty to alert the defendant (present petitioner) to the tapes and transcripts. For that proposition the Court of Appeals, 581 F.2d at 1293 cited *U.S.* v. *Del Toro*, 513 F.2d 656 (2nd Cir., 1975) as authority for the prosecution's "lack of duty". HOWEVER, IN *DEL TORO* AS THE WITNESS WAS TESTIFYING BEFORE THE GRAND JURY THE FOLLOWING IS CONSPICUOUS IN THE *DEL TORO* OPINION:

> *When the Assistant conspicuously put some boxes of tape recordings on the table, Kaufman said he would like to change his testimony and admitted that Morales had asked him for money.* (513 F.2d at 665; emphasis ours).

Thus, the very authorities cited as suggesting no duty on the prosecutor to alert the grand jury witness . . . demonstrates that the prosecutor in that case . . . did exactly what the prosecutor did not do in this case (alert the petitioner to the previously recorded telephone conversations which were the *sine qua non* of the instant indictment; Petitioner's indictment is reproduced at App. D, *infra*). The haunting features of these tapes, transcripts (and the government's denial of their very existence during the trial in *U.S.* v. *Camp and Disston*, 73 CR 881) . . . are a demonstration of the pregnant possibility of the type of prejudice resulting from the government playing "poker" with the criminal justice system.

In *Warduis* v. *Oregon*, 412 U.S. 470 (1973) this Court discussed both "the poker game" and "due Process" while reversing a state narcotic conviction. The Court stated:

> ". . . The *adversary system of trial is hardly an end itself; it is not yet a poker game in which players*

> *enjoy an absolute right always to conceal their cards until played.* We find ample room in that system, at least as far as '*due process*' is concerned, for (a rule) which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." (412 U.S. at 474).

We close this petition with a statement by Mr. Justice Frankfurter:

> No single one of these circumstances alone would in my opinion justify a reversal. I cannot escape the conclusion, however, that in combination they bring the result below the Plimsoll line of "due process."[29]

CONCLUSION

In that each question presented reflects substantial and important questions that merit consideration by this Court because of their impact on federal criminal trials, it is respectfully urged that this Petition be granted and that this Court review each of the four (4) questions presented; and thereafter vacate the instant conviction with directions that the case be tried anew.

Respectfully submitted,

ALLAN A. ACKERMAN, ESQ.
100 North LaSalle Street
Suite 611
Chicago, Illinois 60602
(312) 332-2863
For Petitioner,
Mitchell Edelson, Jr.

[29] *Fikes* v. *Alabama*, 352 U.S. 191 at 199 (1957).

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1613

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MITCHELL EDELSON, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 CR 630—Frank McGarr, *Judge.*

Argued June 1, 1978—Decided August 30, 1978

Before PELL, TONE, and BAUER, *Circuit Judges.*

PER CURIAM. On October 22, 1975, the defendant- appellant Mitchell Edelson, Jr., was charged with violating 18 U.S.C. § 1623 by making false material statements to a federal grand jury that was investigating the involvement of one Vito Nicasio in the transfer of stolen securities. The Government's evidence at trial consisted largely of

seven taped conversations that had been recorded by an informant named Roger Camp. On the basis of these recordings, the trial court found the defendant guilty on April 4, 1977. From this judgment Edelson now appeals.

In the first of several arguments on appeal, Edelson claims that the district court improperly denied his pretrial request for the production of certain grand jury materials. While the appellant did receive a transcript of his own testimony, he insists that the additional materials might have disclosed evidence of prosecutorial misconduct or enabled him to show that his own assertions were not "material" to the grand jury's investigation.

A defendant, however, is not entitled to a disclosure of grand jury proceedings without some demonstration of "particularized need," *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, 400 (1959), and such a demonstration has not been made in this case. To begin with, Edelson has not pointed to anything in the record which might suggest that the prosecution engaged in improper conduct before the grand jury. His claims on this point, therefore, amount to nothing more than unsupported speculation, and this is not enough to constitute a "particularized need." See *United States* v. *Bitter*, 374 F.2d 744, 748 (7th Cir. 1967); *United States* v. *Chase*, 372 F.2d 453, 466 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967).

If Edelson wished to determine whether the grand jury minutes contained any information inconsistent with the evidence offered by the government to meet its burden of proof on materiality, the proper procedure would have been to ask the district judge to examine the minutes *in camera* and report on the record whether they contained

such inconsistent information. If they did, the Government would then be forced to elect whether to acquiesce in disclosure or dismiss the indictment. Edelson made no request for *in camera* inspection by the judge. It is apparent from the record in any event that his omission did not prejudice him, because the questions and answers concerning his knowledge of possible stolen securities and counterfeit money transactions were relevant to the grand jury's inquiring into possible violations of the law relating to stolen securities and counterfeit currency.

The appellant next attacks the admissibility of the seven taped conversations on the grounds that 18 U.S.C. § 2511 (2)(d) is void for vagueness. The statute provides:

> "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or any State or for the purpose of committing any other injurious act."

We note at the outset that it is by no means clear that Edelson has standing to raise the vagueness argument since the statute does not charge criminal violations against the *non-recording* party to the recorded conversation. But assuming, *arguendo*, that Edelson does have standing, we are not persuaded by the appellant's claim that the terms "criminal," "tortious" and "injurious act" are so vague that "men of common intelligence must guess at [their] meaning and differ as to [their] application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1965). On the

contrary, we find the statute to be sufficiently explicit to "inform those who are subject to it what conduct on their part will render them liable to its penalties."[1] *Id.*

We also cannot agree with Edelson's claim that the Government's conduct in the circumstances of this case was so "outrageous" as to constitute a denial of due process rights. On this point, the appellant appears to argue that he was "entrapped" by the Government because he was not informed of his "target" status before the grand jury, nor was he informed that the Government had in its possession the recordings of his conversations with Camp.

The district court found, however, that the "target" of the grand jury's investigation was not Edelson but Vito Nicasio, and we see no reason for disturbing this finding on appeal. The mere fact that the grand jury interrogation focused on some of the appellant's specific activities does not mean that he had become the target of the investigation, for those activities were directly related to Nicasio's alleged involvement in the transfer of stolen or fraudulent securities. Equally if not more important, however, the Supreme Court has recently determined that the failure to inform a grand jury witness that he is a target of the investigation does not alone amount to a due process denial which could excuse perjury. *United States* v. *Mandujano*, 425 U.S. 564 (1976). Thus, even if Edelson "was indeed a 'putative defendant,' that fact would have no bearing on the validity of a conviction for testifying falsely." *Id.* at 583.

[1] In this connection, Edelson also claims that the recorded conversations were a tortious invasion of his privacy and thus did not comply with the terms of § 2511(2)(d). It is quite clear, however, that the conversations were not recorded "for the purpose of" invading the appellant's privacy.

Similarly, we cannot accept the appellant's claim that the prosecution was under an obligation to disclose the existence of the taped conversations before questioning him in the course of the grand jury proceedings. As the Second Circuit has held:

> "There is no duty on the prosecution to tell a Grand Jury witness what evidence it has against him or to give him repetitive warnings that it is his duty to tell the truth when he has sworn upon his oath to tell the truth. It is not an unfair dilemma to put upon a prospective defendant to require him to claim [the Fifth Amendment] privilege or to tell the truth."

United States v. *Del Toro*, 513 F.2d 656, 664 (2d Cir. 1975).

In sum, then, we find nothing remotely akin to "entrapment" in the facts of this case. Edelson was not encouraged or solicited by the Government to commit perjury, but rather, was lawfully subpoenaed to answer questions about matters that were directly related to the grand jury's inquiry. The appellant was "free at every stage to interpose his constitutional privilege against self-incrimination, but perjury was not a permissible option."[2] *United States* v. *Mandujano*,, *supra* at 584.

Finally, Edelson insists that the Government's evidence was insufficient to establish two necessary elements of a § 1623 offense: (1) the falsity of his statements before the grand jury and (2) the materiality of his statements to the grand jury's investigation. The first claim warrants little discussion. In the course of the grand jury proceedings, Edelson gave the following responses:

> Q. "Did you ever tell Mr. Camp that Mr. Nicasio would be hesitant about bringing merchandise, se-

[2] It should perhaps be noted that the appellant was advised of his constitutional rights on three occasions in the course of his grand jury appearance.

curities, or any type of property whatsoever across state lines, or that he was not going to cross the state lines with the merchandise or property?"

A. "I did not say such a thing to Mr. Camp."

Q. "Did you ever agree with Roger Camp to make arrangements for the exchange of said merchandise, whatever it may be, in a place outside your office that 'would not and could not be bugged'?"

A. "No, I did suggest a place outside my office. I suggested they go to the American National Bank."

On the other hand, the Government's tape recordings contained the following statements (among others):

Edelson: "But he [Nicasio] is not coming to Chicago, I'll tell you that right now, he's not going to cross the state line with it. You have to go there. But I'm telling you right now there is no way in hell he's going to transport this stuff."

* * *

Edelson: "He [Nicasio] is thinking over how he can handle it without taking the danger of doing anything in the mail or having anything on his person when he crosses the state line."

* * *

Camp: "Well I assume that where we're going to do it is your office, right?"

Edelson: "Probably not."

Camp: "Probably not, okay. But I'm a little leery myself, I understand the nature of the merchandise, it's a little warm, but which doesn't constitute a problem but I want to be as cautious as the next guy, okay?"

Edelson: "You want me to make sure that the arrangements are made, that the meeting takes place in a place that will not and cannot be bugged."

Camp: "Yeah."

Edelson: "Alright, that's simple. Good-bye."

We have no difficulty in concluding that, when taken with the testimony at trial, this evidence is sufficient to support the district court's finding that Edelson knowingly gave false answers to the grand jury interrogation.

By the same token, we must conclude that the appellant's responses were "material" to the grand jury's investigation. The grand jury was apropriately concerned with Vito Nicasio's possible involvement in the transfer of stolen or fraudulent securities, and it had ample reason to believe that Edelson was directly involved with Nicasio in this activity. If Edelson had responded truthfully to the questions, a follow-up inquiry might very well have disclosed information that would have inculpated Nicasio. It is quite apparent, therefore, that the appellant's answers had "the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation," *United States* v. *Devitt*, 499 F.2d 135 (7th Cir. 1974), and were thus "material" to the grand jury's inquiry.

We have examined the appellant's other arguments and find them to be without merit. The judgment of the district court is therefore

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 13, 1978

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 77-1613 vs.

MITCHELL EDELSON, JR.,
Defendant-Appellant.

On Petition for Rehearing and Suggestion for Rehearing En Banc

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendant-Appellant Mitchell Edelson, Jr., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby,

DENIED.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 77-1353

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GEOFFREY DISSTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 Cr 881—Thomas R. McMillen, *Judge.*

ARGUED JUNE 1, 1978—DECIDED AUGUST 15, 1978

Before PELL, TONE, and BAUER, *Circuit Judges.*

PELL, *Circuit Judge.* This is an appeal from the district court's orders denying without an evidentiary hearing the defendant's (Disston) motion for new trial on the basis of newly discovered evidence, Fed. R. Crim. P. 33, and denying his petition for writ of habeas corpus, 28 U.S.C. § 2255. Disston seeks relief on the ground that he was denied his Sixth and Fourteenth Amendment rights during his trial in which he was convicted for mail fraud.[1]

---

[1] Disston's conviction was affirmed on direct appeal in an unpublished order. *United States* v. *Disston*, 525 F.2d 694 (7th Cir. 1975).

He first argues that the Government violated his rights by failing to inform him that his co-defendant, Roger Camp, was a Government informer. This, he argues, hindered his ability to succeed in his pre-trial motion to sever, hindered his ability to cross-examine Camp, and required him to stand trial with a co-defendant who may have offered the Government information regarding his (Disston's) trial strategy. Second, he argues that he was denied his Fifth Amendment due process rights because the Government refused to provide him tape recordings of Camp's conversations.

Because of these alleged violations, Disston requests that this court at the very least remand for an evidentiary hearing to determine, *inter alia*, whether Camp's informer status prejudiced his trial and whether the Government knowingly or in bad faith failed to turn over the tape recordings and failed to disclose Camp's informer status. The Government, however, now concedes that the district court should have granted an evidentiary hearing,[2] and we agree. *See, e.g., Weatherford* v. *Bursey*, 429 U.S. 545 (1977); *United States* v. *Esposito*, 523 F.2d 242 (7th Cir. 1975); *United States* v. *Gerard*, 491 F.2d 1300 (9th Cir. 1974); *Caldwell* v. *United States*, 205 F.2d 879 (D.C. Cir. 1953). Disston seeks alternatively that we remand for a new trial or with instructions to dismiss the indictment. We must, therefore, examine the Government's conduct to determine whether, on the basis of the record now before us, we should conclude that the Government's conduct constitutes grounds for a new trial or dismissal of the indictment. Although we view the Government's conduct or misconduct as a whole, we will first address the issue of Camp's informer status, and then the Government's failure to disclose that status and to turn over the tapes.

[2] In his original brief in the present appeal, Disston prayed in the alternative for remand for dismissal or new trial, or remand for an evidentiary hearing. Subsequent to the Government's concession as to the necessity for an evidentiary hearing, the Disston reply brief prayer was narrowed to dismissal or new trial. We do not regard the omission as constituting a complete abandonment of the earlier requested alternative relief.

I. *The Co-defendant Informer*

If Disston's co-defendant was a Government informer, and if he obtained information prejudicial to Disston or regarding Disston's trial strategy which he then transferred to the Government, Disston's conviction should be reversed. *See Caldwell* v. *United States*, 205 F.2d 879 (D.C. Cir. 1953). The newly discovered evidence on which Disston bases his claim for relief indicates at least that Camp had met with Government agents and provided them with some information.[3] Although the evidence is sufficient to label Camp an informer, it does not suggest that Camp provided the Government with any information that might prejudice Disston's trial.

This, however, does not exonerate the Government *vis-a-vis* Disston, because the Government never disclosed Camp's informer status and thus the district court was never apprised of the scope of Camp's relationship with

[3] The newly discovered evidence includes testimony of Camp and Government agents in *United States* v. *French*, 75 Cr 448 (N.D. Ill.), and *United States* v. *Edelson*, 75 Cr 630 (N.D. Ill.), which indicated Camp's status as a Government informer, and tape recordings made by Camp of telephone conversations between himself and Mitchel Edelson, an attorney, which Camp had provided to the Government. Edelson later represented Camp at trial.

the Government. That Camp was a Government informer during the same general time period that he was tried with Disston, and that the Government failed to disclose this fact, at least raises an issue of whether his relationship with the Government may have prejudiced Disston. A determination of this issue requires more facts and, therefore, an evidentiary hearing is appropriate. If the information Camp gave the Government was irrelevant to the Camp-Disston trial and could not have prejudiced Disston, then the fact that Camp and Disston were tried together would not constitute reversible error.[4]

II. *The Government's Non-disclosure of Evidence*

The Government's failure to disclose Camp's informer status and its failure to turn over the tapes of telephone conversations between Camp and Edelson raised a difficult question of Government misconduct. Prior to trial, Disston filed a discovery motion seeking recorded statements of Camp. The district court granted the motion on March 13, 1974.[5] On April 30, 1974, Camp filed a pretrial discovery motion seeking electronically recorded conversations to which he was a party and this motion was granted on June 13, 1974. Although the district court granted these motions, the Government did not turn over the tapes in question. The Government's response throughout the trial was that it was unaware of any such eavesdropping or electronic surveillance of Camp, and affidavits

[4] Disston filed a motion to sever on April 19, 1974 which was denied on April 26, 1974.

[5] The district court granted the motion conditional upon Camp not being a prospective Government witness, which he was not. *See* Fed.R.Crim.P. 16(a)(2).

to this regard were filed by the Assistant U.S. Attorney who prosecuted the case.[6]

The newly discovered evidence indicates that Camp met with some Government agents in New York several months before the trial and thereafter remained in contact with these and other agents. He personally tape-recorded conversations between himself and Mitchel Edelson, the Chicago attorney who later represented Camp during the trial. Camp apparently gave these tapes to Government agents in Chicago in April 1974. The Government agents were not members of the U.S. Attorney's Office and there is no evidence that the U.S. Attorney or his assistants had knowledge of these tapes.[7] The district court examined the tapes *in camera* during post-conviction proceedings and concluded that the tapes were entirely irrelevant to the Camp-Disston trial. It, therefore, denied post-conviction relief.

The record before us is deficient for the purpose of making two critical determinations. Primarily, it lacks sufficient facts regarding the circumstances of the Government's non-disclosure of the tapes and of Camp's informer status, *e.g.*, the good faith, bad faith, or inadvertence

[6] The Assistant U.S. Attorney who prosecuted this case filed affidavits in late July and August of 1974, after the trial, which stated that he was "not aware of any electronic surveillance of the defendant Roger Camp or of any premises owned, leased or occupied by him," and that he had been advised by the Department of Justice that the following agencies had not conducted electronic surveillance of Roger Camp: Federal Bureau of Investigation, Securities and Exchange Commission, Secret Service, Post Office, Internal Revenue Service, Customs Service, Alcohol, Tobacco Tax and Firearms Division, Department of the Treasury, and Drug Enforcement Administration.

[7] The agents who received the tapes apparently were agents of the Secret Service and Chicago Strike Force.

of the prosecutors.[8] Secondarily, the parties did not have a full opportunity to demonstrate the relevancy and materiality of the tapes as they would have had in the factual context that might have been developed with and (sic) evidentiary hearing. The district court's decision does indicate that Disston was ordered to prepare a transcript of tape recordings which had been filed *in camera* and to specify the way in which he was prejudiced by the matters contained in the transcripts. Whether with an evidentiary hearing Disston can demonstrate any prejudice which he could not with only the tapes themselves remains to be seen. We are concerned at the present moment with his having the opportunity to try.[9]

In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

---

[8] For example, the accuracy of the prosecutor's affidavits was not probed. *See* note 6 *supra*.

[9] Our decision in this case carries no implication that due process requires that tape recordings be made automatically available to a defendant. On a case-by-case basis, the trial judge will have to determine the appropriateness of the tapes, or parts thereof, being made available. In the case before us it had been determined that the tapes should be made available but there was non-compliance with the order followed by post-trial ascertainment that the recorded messages were those of a Government informer. We do not intend to lay down any principles regarding pre-trial or trial use of such recordings beyond the narrow factual confines of the particular case before us.

Thus a finding of materiality is a critical aspect of the due process analysis. Moreover, although the good faith or bad faith of the prosecutor is irrelevant if the evidence is material, the good or bad faith of the prosecutor may well bear on the materiality determination. In *United States* v. *Esposito, supra* at 248-49, this court stated

> [A] court should be less inclined to hold unproduced evidence immaterial or to hold the non-production of admittedly material evidence harmless error if the proseceutor's failure to reveal the evidence was not in good faith . . . . On the other hand, if the non-production is in good faith, no special benefit of the doubt need be given the defendant's position. [Citations omitted.]

We note also that the standard for materiality may differ depending on whether the defendant specifically requested the non-disclosed evidence. *Compare United States* v. *Agurs*, 427 U.S. 97, 106, 112 (1976), *with Brady* v. *Maryland, supra*. *See also United States* v. *Anderson*, 574 F.2d 1347, 1353-55 (5th Cir. 1978); *United States* v. *Keogh*, 391 F.2d 138, 147 (2d Cir. 1968); *Jones* v. *Jago*, 428 F.Supp. 405, 408 (N.D. Ohio 1977). Thus the materiality standard for non-disclosure of the tapes would be different than for non-disclosure of Camp's informer status.

In any event, these are issues that cannot be properly resolved without a more complete development of the facts. We, therefore, remand to the district court for an evidentiary hearing. After the facts have been fully developed, the district court should order a new trial if it finds that the non-disclosure was not harmless. *See Giglio* v. *United States*, 405 U.S. 150, 153-54 (1972). In addition, the court should examine the prosecutor's conduct as a whole to determine whether it was so egregious as to

merit dismissal of the indictment. This latter disposition is, of course, an extraordinary one which should be reversed for only the most serious misconduct.

Accordingly, the order denying the post-conviction motions is vacated and this cause is remanded for further proceedings before the same trial judge, said further proceedings to be consistent with this opinion.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

UNITED STATES OF AMERICA

v.

MITCHELL EDELSON, JR.

No. .....
Vio.: Title 18, United States Code
Section 1623

The SPECIAL NOVEMBER 1974 GRAND JURY charges:

1. That on May 6, 1975, at Chicago, in the Northern District of Illinois, Eastern Division,

MITCHELL EDELSON, JR.

defendant, while under oath as a witness before the Special November 1974 Grand Jury of the United States of America, duly empaneled and sworn in the United States District Court for the Northern District of Illinois, in a case then and there pending before the Grand Jury, did knowingly make false material declarations.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation pertaining to possible violations of the criminal laws of the United States, that is, among others, Sections 371, 2314 and 2315 of Title 18, United States Code.

3. During the course of the investigation by the Grand Jury it became and was a material matter for the Grand Jury to determine whether the defendant had ever acted as a go-between for Roger Camp and Vito Nicasio in making arrangements for the sale of stolen securities or counterfeit United States currency.

4. That at that time, defendant Mitchell Edelson, Jr., after having been sworn, and then being under oath to testify truthfully, did knowingly and falsely state in substance before the Grand Jury that he had never heard the expression "Q.," whereas Mitchell Edelson, Jr. then well knew that he had heard the expression "Q."

5. That at that time, defendant Mitchell Edelson, Jr., after having been sworn, and then being under oath to testify truthfully, did knowingly and falsely state in substance before the Grand Jury that he never told Roger Camp that Vito Nicasio would not bring the merchandise across state lines, whereas Mitchell Edelson, Jr. then well knew that he had told Roger Camp that Vito Nicasio would not bring the merchandise across state lines.

6. That at that time, defendant Mitchell Edelson, Jr., after having been sworn, and then being under oath to testify truthfully, did knowingly and falsely state in substance before the Grand Jury that he never agreed with Roger Camp to make arrangements for the exchange of merchandise in a place that would not and could not be bugged, whereas Mitchell Edelson, Jr. then well knew that he had agreed with Roger Camp to arrange for the exchange of merchandise in a place that would not and could not be bugged.

7. That at that time, defendant Mitchell Edelson, Jr., after having been sworn, and then being under oath to testify truthfully, did knowingly and falsely state in substance before the Grand Jury that he did not suggest to Roger Camp that he hold Roger Camp's money in a safety deposit box while Roger Camp examined merchandise in the possession of Vito Nicasio, whereas Mitchell Edelson, Jr. then well knew that he had suggested to Roger Camp that a safety deposit box under the control of Mitchell Edelson, Jr. be used to hold Roger Camp's money while Roger Camp examined the merchandise belonging to Vito Nicasio.

All in violation of Title 18, United States Code, Section 1623.

A TRUE BILL:

Lillie Connor
FOREMAN

Samuel V. Skinner
United States Attorney